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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1096

CHARLES LANCE, JR.,

Petitioner,

v.

LUCILLE PLUMMER et al.,

Respondents.

PETITION FOR REHEARING

CHESTER BEDELL
C. HARRIS DITTMAR
1520 Barnett National Bank Building
Jacksonville, Florida 32202

HAMILTON D. UPCHURCH
Exchange Bank Building
St. Augustine, Florida 32084

Attorneys for Petitioner.

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PETITION FOR REHEARING

Petitioner, Charles Lance, Jr., prays that this Court grant a rehearing of its order of May 2, 1966, denying the petition for writ of certiorari, ... U.S. ....., and that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit in the above-styled cause as prayed for in the petition filed March 7, 1966.

Grounds for Granting Rehearing and Issuing the Writ

In addition to the grounds presented in the petition for writ of certiorari and set forth in the dissenting opinion of Mr. Justice Black, ... U.S. ....., 86 S. Ct. 1380, the following grounds exist for issuing a writ of certiorari:

I.

Subsequent to the filing of petitioner's petition for writ of certiorari, the United States Court of Appeals for the Fifth Circuit released its opinion in *National Association for the Advancement of Colored People* v. *Thompson* (5th Cir. 1966), 357 F.2d 831. In and by that decision, the Court of Appeals directed the United States District Court for the Southern District of Mississippi to issue an injunction enjoining the defendants (all of whom were either state, county or municipal officers), "their successors in office, their agents, servants and employees" from, among other things, "denying to Negro citizens equal access to and equal treatment in any place of public accommodation as defined by the Civil Rights Act of 1964" (357 F.2d at 841). Although *NAACP* v. *Thompson* follows the lead of the instant case in supplementing Title II of the Civil Rights Act of 1964 by a general injunction in favor of "Negro citizens," it does not follow the lead of the instant case and purport to make the injunction effective as "to any other persons to whom notice or knowledge of [the injunction] may come" [*Lance* v. *Plummer* (5th Cir. 1965), 353 F.2d 585, 588].

Thus, in the Southern District of Mississippi, the Fifth Circuit-directed injunction supplementing Title II of the Civil Rights Act of 1964 runs against no one other than the defendants, "their successors in office, their agents, servants and employees"; whereas, in the Middle District of Florida, the Fifth Circuit-approved injunction supplementing Title II runs against all persons who obtain knowledge or notice of the injunction. The petitioner was held to be subject to the injunction although the evidence showed no more than that petitioner had heard on television of its issuance (R. 162, 209). The question naturally arises as to whether it is the inclusion of the words "any other person to whom

notice or knowledge . . . may come" that makes television viewers subject to the provisions of such an injunction or whether television viewers in Mississippi are subject to the provisions of the injunction effective in that state, irrespective of the fact that it does not contain those words. Since the concept of an injunction operating against persons obtaining knowledge of its issuance is new to the law and, as pointed out in petitioner's petition for writ of certiorari and in Mr. Justice Black's dissent, a departure from prior decisions of this Court and of other courts of appeal, this Court should grant certiorari for the purpose of defining the full effect of such injunctions and establishing guidelines for the courts, the bar and litigants.

The situation in this case is similar to that in *Schriber-Schroth Co.* v. *Cleveland Trust Co.* (1938), 305 U.S. 47, 59 S.Ct. 8, 83 L.Ed. 34, cited in this Court's Rule 58 as an example justifying the granting of a petition for rehearing of an order denying a petition for writ of certiorari. In that case, this Court granted certiorari on a petition for rehearing upon a showing that "litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the Sixth Circuit" (305 U.S. at 50, 59 S.Ct. at 10). In the instant case, litigation elsewhere with a resulting conflict of decision is improbable because of the concentration of civil rights cases in the Fifth Circuit.

II.

In addition to the grounds previously presented in petitioner's petition for writ of certiorari, the writ should be issued for the reason that petitioner was wrongfully deprived of the right to trial by jury provided by 42 U.S.C., § 2000h, in any proceeding for "criminal contempt arising under Title II" of the Civil Rights Act of 1964 (App. 56). Although the

proceedings against petitioner were labeled "civil contempt," they had all the characteristic indices of criminal contempt proceedings: (1) the order to show cause (R. 40), insofar as it related to petitioner, was issued on the court's own motion, the application for an order to show cause (R. 38) having been limited to certain named defendants; (2) the proceedings against petitioner were not conducted for the purpose of enforcing private rights, but were maintained for the purpose of vindicating the court's authority and punishing petitioner; and (3) the sanctions were punitive in nature.*

In holding that the proceedings against petitioner were proceedings for "civil contempt," the Court of Appeals has rendered a decision in conflict with this Court's decision in *Nye* v. *United States* (1941), 313 U.S. 33, 61 S.Ct. 810, 85 L.Ed. 1172, and the decision of the Court of Appeals for the First Circuit on the same point in which that court held:

> ". . . the trial court can have only a public as distinguished from a private interest in the enforcement of its own decrees. It seems to us, therefore, that regardless of what label may be appended to the proceedings by the court, any action of contempt initiated by the court of its own motion must be regarded as criminal in nature for the vindication of the court's authority and the punishment of the public wrong."
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> *MacNeil* v. *United States* (1st Cir. 1956), 236 F.2d 149, 154; *cert. den.* 352 U.S. 912, 77 S.Ct. 150, 1 L.Ed. 2d 119.

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* The sanction requiring petitioner to pay plaintiffs' attorney $200 as a condition to purging the contempt (App. 24) is a punitive sanction; it is far different from a civil judgment in favor of plaintiffs for costs, including attorney's fees.

Also, the sanction requiring petitioner to resign as a deputy sheriff and to forever refrain from acting "under any color, guise, or pretense as a law enforcement or peace officer" (App. 24) was a punitive sanction.

In affirming the lower court's conviction of the petitioner without a jury trial, irrespective of the provisions of 42 U.S.C., § 2000h, the Court of Appeals has so far sanctioned such a departure by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Conclusion

For the reasons set forth herein and in the petition for writ of certiorari, and for the reasons set forth in Mr. Justice Black's dissent, joined in by Mr. Justice Harlan, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHESTER BEDELL
C. HARRIS DITTMAR
1520 Barnett National Bank Building
Jacksonville, Florida 32202

HAMILTON D. UPCHURCH
Exchange Bank Building
St. Augustine, Florida 32084

Attorneys for Petitioner

Certificate of Counsel

I CERTIFY that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Chester Bedell

Counsel